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No. 91-734

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

NORTHWEST AIRLINES, INC.,

Cross-Petitioner,

v.

WILLIAM D. WEST,

Cross-Respondent.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN RESPONSE TO CROSS-PETITION

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QUESTION PRESENTED

Did the court of appeals correctly find that cross-respondent's state common law claim for compensatory damages is not preempted by section 105 of the Federal Aviation Act when a separate provision of that law expressly preserves state common law remedies and when there is no indication that Congress intended section 105 to be given such a sweeping reading?

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BRIEF IN RESPONSE TO CROSS-PETITION

Northwest Airlines does not oppose Mr. West's petition in No. 91-505, which focuses on the punitive damages portion of the decision below. Instead, it asks the Court also to review the compensatory damages portion of that ruling, arguing that: (1) the Ninth Circuit's reasoning conflicts with rulings in other circuits regarding the preemptive effect of section 105(a)(1) of the Federal Aviation Act, 49 U.S.C. App. § 1305(a)(1), and (2) Congress expressly intended that "*all* state law is preempted" by section 105(a)(1), a ruling which the district court adopted here, but which the Ninth Circuit rejected. Cross-petition at 9 (emphasis added).

We agree with Northwest's first point that a conflict exists which the Court should resolve. Thus, we do not oppose the cross-petition, even though we dispute Northwest's second point (which

is really an argument on the merits) that the judgment below is wrong. We address each point in turn.

1. The Ninth Circuit held that section 105 does not preempt state laws which regulate conduct on an across-the-board basis, but does preempt state laws which single out airlines or transportation companies for special treatment. Northwest is correct that this analysis is at odds with that adopted in *Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773 (5th Cir.), *cert. denied*, 111 S. Ct. 308 (1990), *subsequent decision*, 924 F.2d 1055 (1991)(mem.), *pet. for cert. pending sub nom. Morales v. Trans World Airlines, Inc.*, No. 90-1604 ("*Morales*"). Indeed, the Ninth Circuit's analysis would produce exactly the opposite result that *Morales* reached, *i.e.*, a holding that Texas laws proscribing false and deceptive practices are not preempted because they apply to all industries, not just airlines.

In our view, the results in these two cases differ because the Ninth Circuit's reading of section 105 is a better approximation of congressional intent than the broad interpretation adopted by *Morales*, as we discuss in point 2 below. For present purposes, however, we confine ourselves to discussing the conflicting state of the law on this issue.

Northwest's cross-petition asks the Court to decide what the relation is between section 105, which preempts state laws "relating to rates, routes, or services," and section 1106 of the Federal Aviation Act, 49 U.S.C. App. § 1506, which states that nothing in that Act "shall in any way abridge or alter the remedies now existing at common law or by statute." Section 105 was adopted as part of the Airline Deregulation Act of 1978, which was enacted two years after this Court's decision in *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976). *Nader* held that section 1106 allows a bumped passenger to pursue a state common law tort remedy even though the Civil Aeronautics Board may be simultaneously examining overbooking practices, and the Deregulation Act left section 1106 intact. Questions about the interaction of sections 105 and 1106 have arisen in a number of cases, and the lower courts have taken a variety of analytical approaches.

Northwest appears to be arguing that section 105 repealed section 1106 by dint of its subsequent enactment. Although repeals by implication are not favored, *see Watt v. Alaska*, 451 U.S. 259, 266-67 (1981), the Fifth Circuit adopted this reasoning in

O'Carroll v. American Airlines, Inc., 863 F.2d 11, 13, *cert. denied*, 490 U.S. 1106 (1990)(alleging tortious refusal to carry passenger), cited in cross-petition at 6-7. In *Morales*, the Fifth Circuit took a slightly different tack, holding that section 1106 "does not preserve state common law remedies when there is express preemption under" section 105, 897 F.2d at 783, but offered no guidance in determining which state law claims are preserved and which ones are preempted (other than the false advertising claims found to be preempted there).

Still other cases have held that the "relating to rates, routes, or services" language in section 105 is both clear on its face and broad in its sweep. *E.g.*, *Illinois Corp. Travel v. American Airlines, Inc.*, 889 F.2d 751 (7th Cir. 1989), *cert. denied*, 490 U.S. 1106 (1990)(preempting tortious interference with contract and other claims); *Anderson v. USAir, Inc.*, 818 F.2d 49 (D.C. Cir. 1987)(preempting tortious refusal to provide courteous service); *cf. Abourezk v. New York Airlines*, 895 F.2d 1456, 1459 (D.C. Cir. 1990)(Edwards, J., concurring)(suggesting that false imprisonment preempted). The problem with this analysis is that it can produce results which Congress could not possibly have intended. *See English v. General Electric Co.*, 110 S. Ct. 2270, 2277 (1990). *See also People of the State of New York ex rel. Abrams v. Trans World Airlines, Inc.*, 728 F. Supp. 162, 176-77 (S.D.N.Y. 1989).

To illustrate the point, suppose that an airline operates an aircraft negligently, and there is a crash that kills everyone on board. In domestic accidents, liability and damages are assessed under state tort law. Such damage awards surely "relate to" an airline's "services" at some abstract level, yet it would be absurd to assume that Congress enacted section 105 with either an explicit or implicit intent to strip crash victims and their families of a remedy, and several courts have so held, rejecting preemption arguments out of hand. *See In re Air Crash Disaster at John F. Kennedy Airport on June 24, 1975*, 635 F.2d 67, 74 (2d Cir. 1980); *In re Air Crash Disaster at Stapleton Int'l Airport, Denver, Colo., on Nov. 15, 1987*, 721 F. Supp. 1185, 1187 (D. Colo. 1989); *cf. In re Mexico City Air Crash of Oct. 31, 1979*, 708 F.2d 400, 407-08 (9th Cir. 1983)(declining to recognize right of recovery under federal law and apparently assuming state tort laws not preempted).

It is difficult to see how the "relating to" language in section 105 is so plain on its face that it commands a preemptive result in

tort suits such as *O'Carroll*, *Illinois Corp. Travel* and *Anderson*, but not in tort suits involving aviation accidents. Nor is this the only area where anomalies abound. For example, one court held that section 105 preempts a state law breach of contract suit by Frontier Airlines against United Airlines over the way that United handled Frontier's fares in United's computer reservation systems. *Frontier Airlines, Inc. v. United Air Lines, Inc.*, 758 F. Supp. 1399, 1407-09 (D. Colo. 1989). Yet section 105 posed no barrier in another court to Alaska Airlines recovering a damage award (also against United) in a virtually identical breach of contract suit which was brought under Alaska law. *Alaska Airlines, Inc. v. United Airlines, Inc.*, 902 F.2d 1400 (9th Cir. 1990).

Questions about the reach of section 105 have also arisen in other contexts without producing a clear or predictable analytical pattern. *Air Transport Ass'n v. Public Utilities Comm'n of the State of California*, 833 F.2d 200 (9th Cir. 1987), *cert. denied*, 487 U.S. 1236 (1988), upheld a PUC rule barring telephone customers from surreptitiously overhearing or recording conversations without notice to the parties to that conversation. Although that rule affected the airlines' ability to monitor their ticket agents' answers to telephone calls seeking information "relating to rates, routes, or services," no preemption was found. In *Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408 (9th Cir. 1984), the court split the difference in a suit by a blind passenger who was denied boarding because the airline required blind passengers to sit in bulkhead seats and none was available. Section 105 was held to preempt a state law claim barring discrimination against handicapped passengers, but not a claim for intentional infliction of emotional distress based on the passenger's treatment by the gate agent. *Id.* at 1415-16. And in *Bieneman v. City of Chicago*, 864 F.2d 463, 470-73 (7th Cir. 1988), common law remedies for airport noise or pollution were held not to be preempted.[1]

Each of these cases can arguably be distinguished in some

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[1] Apart from these situations, the proper interpretation of section 105 has been an issue in various other tort or contract cases which have not yet been decided by federal appellate or state supreme courts. *E.g.*, *Vail v. Pan Am Corp.*, 752 F. Supp. 648 (D.N.J. 1990)(adequacy of airline and airport security programs); *Wolens v. American Airlines*, 207 Ill. App. 3d 35, 565 N.E.2d 258 (1990)(frequent flyer programs).

way, and for that reason one could argue that the Court should wait for a case which creates a direct conflict on precisely the same point of law. The Solicitor General recommended that approach in *Morales*, where he urged that Texas' petition be denied and that questions about the preemptive scope of section 105 as applied to state regulation of airline advertising be allowed to percolate among the lower courts until a square conflict arises on that very point. Brief for the United States as *Amicus Curiae* in Nos. 90-1604 and 90-1606, at 22-23.

Even if the Court were inclined to take that approach in that specific context, *i.e.*, state efforts to regulate advertising that is also subject to federal regulation, the arguments for denying review are weaker in the broader context of common law private actions such as this case. As the cited cases illustrate, questions about the interaction of state law claims and sections 105 and 1106 can arise in a variety of contexts. The lower courts have been unable to agree on a uniform method of analyzing these issues, and intervention by this Court will help resolve the present confusion, which appears otherwise likely to continue. For these reasons, we do not oppose Northwest's cross-petition.[2]

2. Northwest also argues that review is warranted because Congress expressly preempted "*all* state law" in order to prevent the balkanization of conflicting state and federal regulations. Cross-petition at 9 (emphasis added). This is not really a separate reason to grant review so much as it is a summary of Northwest's argument on the merits, which we answer first by posing a few questions which Northwest has never been able to answer.

If, as Northwest argues, Congress decided in 1978 to enact the preemptive language in section 105 which is said to be so sweeping, why did Congress leave intact section 1106, which

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[2] Apart from Northwest's cross-petition and the *Morales* petition, the scope of section 105 is before the Court in a third context. In *Public Utilities Comm'n of the State of California v. Federal Express Corp.*, No. 91-502, the Court is being asked to review a ruling that section 105 preempts state motor carrier regulation insofar as it affects Federal Express's ability to carry packages on intrastate routes within California. 936 F.2d 1075 (9th Cir. 1991). Of the pending cases, we believe that our petition and Northwest's cross-petition present the best vehicles for providing guidance to the lower courts on the myriad situations in which preemption issues arise.

preserves state common law rights, which had been on the books unchanged for the preceding 40 years, and which this Court had construed only two years previously in *Nader*? And if section 105 really preempts "all" state law, what tort remedy is available to crash victims and their families? Since the Airline Deregulation Act did not create any federal causes of action, are victims supposed to pursue tort claims as a matter of federal common law? Or do they have no rights at all?

Moreover, the argument that Congress wanted section 105 to have a broad preemptive effect relies on cases construing similar "relating to" language in ERISA, *e.g.*, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985). Northwest made this argument below, as did the Solicitor General in his brief in *Morales* (at 8-9). There are, however, two problems with this claim, apart from the enduring presence of section 1106.

First, this Court emphasized in a case decided the same day as *Shaw* that the preemption clause in ERISA is "virtually unique." *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n.26 (1983). Thus, the preemptive intent which Congress had in the pension context cannot be readily imputed to other statutes. *See Environmental Encapsulating Corp. v. City of New York*, 855 F.2d 48, 56 (2d Cir. 1988)(a broad reading of ERISA's "relating to" language should be "confined to the ERISA regulatory scheme").[3]

Second, Northwest ignores legislative history which identifies the specific problem which Congress wanted section 105 to solve. Congress was concerned about an emerging pattern of state regulatory bodies second-guessing route and rate decisions of the Civil Aeronautics Board. Having made a policy decision to end the federal government's authority to tell airlines where they can fly and how much they can charge, Congress thought that it would make little sense to let the 50 states try to fill that vacuum with

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[3] In our view, the precise reach of a preemption statute can rarely, if ever, be determined by looking at results under other laws. For example, whatever the Court may find to have been Congress's intent in *Cipollone v. Liggett Group Inc.*, No. 90-1038, or any other pending preemption case will not explain what the 95th Congress meant when it amended the Federal Aviation Act to add section 105 while retaining section 1106 unchanged.

their own notions of what is a reasonable fare or how many airlines should operate on a given route, even within their own borders. *See* S. Rep. No. 95-631, 95th Cong., 2d Sess. 98 (1978); H.R. Rep. No. 95-1211, 95th Cong., 2d Sess. 15-16 (1978); H.R. Conf. Rep. No. 95-1779, 95th Cong., 2d Sess. 94-95 (1978). One searches the legislative history in vain for evidence that the advent of economic deregulation was intended to abolish the states' ability to provide tort remedies to its citizens or to enforce private contracts.

One case illustrates our answer to the claim that section 105 must be read broadly in order to prevent an undesirable balkanization in the law. In *Hiawatha Aviation of Rochester, Inc. v. Minnesota Dep't of Health*, 389 N.W.2d 507 (Minn. 1986), a state agency tried to deny an airline a license to operate an interstate air ambulance service. In overturning that ruling, the Minnesota Supreme Court held that section 105 may bar the states from making such licensing decisions, but it does not "oust the state from its traditional role in the delivery of medical services -- the regulation of staffing requirements, the qualifications of personnel, equipment standards, and the promulgation of standards for maintenance of sanitary conditions." *Id.* at 509. Thus, state and federal laws affecting airlines can indeed co-exist.

These points help to explain our earlier statement that the decision below more accurately mirrors congressional intent than does the contrary decision in *Morales*. We believe that it takes a considerable leap to extrapolate from the legislative history a conclusion that Congress wanted to preempt "all" state law, but we recognize that the lower courts have taken disparate approaches in defining the preemptive scope of section 105 and do not oppose the cross-petition for that reason.

CONCLUSION

Mr. West's petition in No. 91-505 should be granted, and he does not oppose granting this cross-petition.

Respectfully submitted,

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